Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIE LLOYD TURNER,
Petitioner,

v.

JOHN JABE, Warden,
Greenville Correctional Center,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

The Virginia capital murder statute, like that of many states, permits a jury to impose a death sentence if it finds "vileness" under any of three predicates—"torture, depravity of mind or aggravated battery to the victim." This Court has indicated that the language of this aggravating factor is unconstitutional on its face absent curative jury instructions and appellate review. The questions presented are:

A. Whether this unconstitutional vagueness is cured by Virginia's jury instruction defining "depravity of mind" as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation" or by Virginia's standards of appellate review, which have never resulted in a reversal of a death sentence on Eighth Amendment grounds.

B. Whether Virginia's jury instructions and standards for appellate review for the "depravity of mind" predicate assure differentiation among crimes eligible for the death penalty, thus satisfying the constitutional requirement that aggravating factors narrow the imposition of capital punishment.

II.

Whether Petitioner received effective assistance of counsel when his lawyer failed to produce any of the evidence promised in his opening statement at the sentencing hearing.

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PETITION FOR A WRIT OF CERTIORARI

Willie Lloyd Turner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming denial of his petition for a writ of habeas corpus in this death penalty case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-99a) is officially reported at 35 F.3d 872 (4th Cir. 1994). The opinion of the District Court (App. 100a-164a) is officially reported at 812 F. Supp. 1400 (E.D. Va. 1993).

JURISDICTION

The Court of Appeals entered judgment affirming the denial of a writ of habeas corpus on September 15, 1994, and the parties' petitions for rehearing were denied on

October 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition invokes the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and involves Sections 18.2-31 and 19.2-264.4 of the Virginia Code. These provisions are reprinted in Appendix E at 175a-178a.

STATEMENT OF THE CASE

1. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court held that a vileness aggravating factor identical to the one at issue here was unconstitutionally vague and overbroad on its face, but indicated that narrowing jury instructions and careful appellate review could save the provision. *Tuilaepa v. California*, 114 S. Ct. 2630 (1994), suggests that any curative jury instructions must both provide a common-sense core of meaning for the vague terms used and narrow the field of potential capital cases. Petitioner's case tests the minimum requirements necessary for a commonly used vileness aggravating factor and squarely presents the provision's constitutional infirmities. Certiorari review is warranted because, for several reasons, there may be no better case in which to resolve the issues raised. First, the jury did not find any other aggravating factor. Second, the jury did not indicate which predicate of vileness supported its finding; thus, if any predicate is unconstitutional, the death sentence cannot stand. Third, the court below ruled that Petitioner's claims are neither *Teague*-barred nor procedurally defaulted. Finally, the fact-pattern presented here—a shooting during a robbery—plainly does not lie at the core of the vileness aggravating factor. The jury was instructed, however, that "depravity of mind," defined as "moral turpitude and psychical debasement," could justify a finding of "vileness," which was the basis

for the death sentence here. There is, therefore, a grave risk that the sentence was based on an unconstitutional understanding of vileness.

The decision below that the jury instructions given in this case were sufficient to uphold Petitioner's death sentence conflicts with a Ninth Circuit case rejecting more specific instructions. The alternative holding that state appellate review also provided an adequate cure conflicts with a decision of the Eighth Circuit because the Virginia Supreme Court does not require consistency among sentences for death-eligible crimes and has never overturned a capital sentence on Eighth Amendment grounds, either on direct or collateral appeal, since the death penalty was reinstated in 1977. In addition, the decision below ignores this Court's requirement that any aggravating factor must limit death-eligibility meaningfully, and the Fourth Circuit has demonstrated that it intends to do nothing more unless directed by this Court to do so. Furthermore, the Virginia Supreme Court has gone so far as to reject *Godfrey* altogether as resting on its unique facts. *Turner v. Commonwealth*, 221 Va. 513, 525, 273 S.E.2d 36, 44 (1980), *cert. denied*, 451 U.S. 1011 (1981). This Court has never considered Virginia's capital sentencing scheme, though Virginia trails only Texas and Florida in the number of prisoners executed since 1977.

2. The rejection of Petitioner's claim regarding denial of effective assistance of counsel is inconsistent with the criteria established by this Court. It also departs from the precedents of other courts of appeals.

A. The Virginia Capital Sentencing Scheme

To convict a defendant of capital murder in Virginia, a jury must find that the defendant committed a "willful, deliberate, and premeditated killing" that meets one of several enumerated descriptions. Va. Code Ann. § 18.2-31 (Michie 1994 Supp.). After conviction, the jury must find the presence of at least one of two aggravating factors

to recommend a death sentence: (1) that "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society" (the "future dangerousness" aggravating factor), or (2) that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim" (the "vileness" aggravating factor). Va. Code Ann. § 19.2-264.4(C) (Michie 1994 Supp.). This statutory language is used to instruct juries during sentencing. If the jury finds one or both aggravating factors are present, it must then make a discretionary determination whether to impose the death penalty in light of any mitigating evidence presented to it. *Smith v. Commonwealth*, 219 Va. 455, 479-80, 248 S.E.2d 135, 150 (1978), *cert. denied*, 441 U.S. 967 (1979).[1]

In Petitioner's case, the jury based its recommendation of a death sentence solely on the vileness aggravating factor. When instructing juries on that aggravating factor, sentencing courts in Virginia, although not required to do so by the Virginia Supreme Court, often offer additional standard jury instructions which further define "depravity of mind" as a "degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Smith*, 219 Va. at 478, 248 S.E.2d at 149.[2] The standard jury instructions also define "ordinary legal malice" as follows:

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[1] If the jury convicts but does not unanimously find the presence of at least one aggravating factor, the sentencing court must impose a sentence of life imprisonment. Va. Code Ann. § 19.2-264.4(E) (Michie 1994 Supp.). The Virginia statutory scheme requires the jury to use a verdict form that indicates the sentence and, if the sentence is death, which aggravating factor or factors were proven. Va. Code Ann. 19.2-264.4(D) (Michie 1994 Supp.)

[2] This petition focuses on the "depravity of mind" predicate for vileness. This case presented no evidence of "torture" and the

> Maliciously means intentionally doing a wrongful act to another without legal excuse or justification. Malice implies that the mind of the actor is under the control of reason. It excludes heat of passion. Malice and heat of passion cannot coexist. Malice includes not only anger, hatred or revenge, but every unlawful or unjustifiable motive. Malice can be inferred from any willful, deliberate, and cruel act against another.

The standard jury instructions also state that "[w]illful, deliberate, and premeditated means the adoption of a specific intent to kill. The intent to kill must come into existence at some time before the killing, but need not exist for any particular length of time."

Armed only with these instructions, a Virginia jury is charged to determine whether the crime in question involved depravity of mind, thus permitting a death sentence under the vileness aggravating factor. If the jury recommends a death sentence, the sentencing court is bound to follow the recommendation unless either facts presented in the assigned probation officer's report indicate that the death sentence is inappropriate or unjust or the defendant can show good cause to set the recommendation aside. *See Frye v. Commonwealth*, 231 Va. 370, 397, 345 S.E.2d 267, 286 (1986).

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instructions given here did not put that predicate before the jury. As for "aggravated battery," the instructions defined it as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith*, 219 Va. at 479-80, 248 S.E.2d at 150. By contrast, this Court has indicated that, for capital sentencing under an identical vileness aggravating factor in Georgia, the standard for aggravated battery requires "evidence of serious physical abuse of the victim before death." *Godfrey v. Georgia*, 446 U.S. 420, 431 (1980). In any event, the jury here did not specify which predicate supported its finding of vileness. Therefore, if any predicate falls short of the constitutional standards established by this Court, the sentence cannot stand.

The Virginia Supreme Court has considered ninety-seven capital cases since 1978.[3] It has never commuted or reversed and remanded a death sentence on Eighth Amendment grounds since the death penalty was reinstated in Virginia in 1977.[4]

B. Petitioner's Capital Sentence

On July 12, 1978, Petitioner shot the owner of a jewelry store during a robbery after the store owner triggered a silent alarm. The store owner was shot three times, one bullet grazing his scalp and two bullets hitting his chest in rapid succession. The second and third shots were each independently fatal. Petitioner was convicted of capital murder in December 1979 and sentenced to death in February 1980. Following federal post-conviction appeals, this Court affirmed the conviction but vacated the death sentence because the trial court had refused to question prospective jurors about possible bias resulting from the fact that Petitioner is African-American and his victim was white. *Turner v. Murray*, 476 U.S. 28 (1986). The proceedings culminating in *Turner v. Murray* are referred to as "*Turner I*". The subsequent resentencing proceedings are referred to as "*Turner II*".

The case returned to the Circuit Court for the County of Southampton, which appointed J. Lloyd Snook, III and Thomas L. Woodward, Jr. as Petitioner's counsel for the resentencing hearing. Snook, who served as lead counsel, had never represented a client in a capital trial, al-

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[3] A table of citations for cases reviewed by the Virginia Supreme Court is included as Appendix D at 166a-174a to this petition. The table also indicates the aggravating factor or factors found by the jury.

[4] The only possible exception is the reversal in *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986). That case cited *Caldwell v. Mississippi*, 472 U.S. 320 (1985), where this Court held that prosecutorial statements diminishing the jury's sense of responsibility for imposition of a death sentence violated the Eighth Amendment. *Frye* does not rely upon the Eighth Amendment directly.

though he had considerable appellate experience in death penalty cases. Woodward, by all accounts, played a minor role in the resentencing.[5]

In *Turner I*, the jury had found both statutory aggravating factors (future dangerousness and vileness) after little more than an hour of deliberation. Although the Virginia Supreme Court concluded that Petitioner's crime did "not rise to the level" of "atrociousness" exhibited in other cases, *Turner v. Commonwealth*, 221 Va. 513, 530, 273 S.E.2d 36, 47 (1980), it nonetheless upheld the jury's finding and sustained the death sentence. In the post-conviction challenges to the conviction and sentence, each reviewing court upheld the findings of both vileness and future dangerousness. *See, e.g., Turner v. Bass*, 753 F.2d 342, 350-53 (4th Cir. 1985).

Under the terms of this Court's remand order, the Commonwealth had six months to resentence Petitioner. Thus, defense counsel knew in July 1986 that the trial would take place in January 1987. The prosecutor promised to present the same case as was offered in *Turner I*. He also promised to introduce evidence of Petitioner's involvement in a breakout incident at Mecklenburg prison in 1984. Defense counsel, however, did virtually nothing to develop a mitigation case during the next several months. He conceded that he did not even begin to focus seriously on the trial until nine days before it was to commence.[6]

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[5] Both attorneys were involved in *Turner I*. Woodward served as co-counsel at trial, while Snook represented Petitioner in post-conviction proceedings.

[6] Defense counsel never conducted a comprehensive interview with Petitioner. He did not meet *any* potential mitigation witnesses until the morning they arrived to testify, and he failed to interview the prosecution's witnesses. Furthermore, he did not subpoena any mitigation witnesses to testify on Petitioner's behalf. His supervision of the court-appointed mental health expert, Dr. Fisher, was so inadequate that Dr. Fisher, the primary witness for the defense, did not examine Petitioner until after the prosecution had rested.

Counsel was aware of but failed to investigate the 1984 prison breakout, and thus did not develop evidence that Petitioner had prevented both murder and rape during the incident. According to one sworn statement, Petitioner told other inmates who had seized guards as hostages and were threatening to kill them: "No, you're not. You're going to have to go thru [sic] me first. If you're going to kill somebody, you will have to kill me first." *Turner v. Williams*, 35 F.3d 872, 902 (4th Cir. 1994). One of the officers whose life had been threatened corroborated this statement. In addition, two corrections officers indicated that Petitioner played a key role in securing the hostages' safety and release. Another officer gave a sworn statement that Petitioner had talked an inmate out of killing all the guards taken hostage and had aided in their release. Still another reported that Petitioner had convinced other inmates not to rape a nurse who had been taken hostage. All of these witnesses could have testified at the resentencing, but defense counsel never contacted any of them.[7]

During *voir dire*, defense counsel voluntarily informed prospective jurors that another Virginia jury had previously sentenced Petitioner to death for the murder at issue in the resentencing.[8] Then, during the opening statement for the defense at the resentencing, he promised to put on mitigating evidence. He rested, however, without presenting any mitigating evidence at all—an omission that the prosecution repeatedly emphasized during closing argument.

The resentencing jury was given the standard instructions set out above. Defense counsel objected to the vile-

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[7] Petitioner was not charged with any crime or institutional infraction in connection with the breakout incident.

[8] One juror indicated that he would probably be affected by his knowledge of the earlier sentence, but he was nonetheless allowed to sit on the jury based on the strength of the prosecution's argument that the influence of the earlier death sentence would be no greater on that juror than on the others.

ness instruction, arguing that because all first-degree murders are vile, horrible and inhuman, the vileness factor did not provide sufficient guidance to minimize the likelihood that the death penalty would be imposed arbitrarily. Furthermore, defense counsel argued that shooting a single victim three times during a bungled robbery did not qualify for vileness. Nevertheless, the court instructed the jury on the vileness aggravating factor using the standard language quoted above.

After deliberating for a time, the jury returned with three questions. The first was whether the original trial transcript was available; the Court replied that it was not. Then the jury asked about the possibility of parole if it found for life imprisonment. Over the objection of defense counsel, the Court replied that the jury "need not concern [itself] with what may happen afterwards." The jury deliberated further, and then returned to ask whether the verdict had to be unanimous for either the death penalty or life imprisonment. The Court answered that the verdict should be unanimous in either case. The jury then returned a verdict fixing the sentence at death based solely on the vileness factor.

C. Subsequent Proceedings

The Virginia Supreme Court upheld the sentence. *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483 (*Turner II*), *cert. denied*, 486 U.S. 1017 (1988). Petitioner then sought state habeas relief, alleging both the unconstitutionality of the vileness aggravating factor and the denial of effective assistance of counsel, among other claims. The same judge who sentenced Petitioner then held a hearing on some of the ineffective assistance claims and denied them, adopting verbatim the Commonwealth's proposed findings of fact; all other claims were dismissed without a hearing. *Turner v. Williams*, No. 901335 (Southampton County Cir. Ct. May 23, 1990). The Virginia Supreme Court denied the petition for appeal. *Turner v. Williams*, No. 901335 (Va. Apr. 30, 1991).

Pursuant to 28 U.S.C. § 2254 (1988), Petitioner sought federal habeas relief. The district court denied Petitioner's motion for discovery and production of documents and his motion for an evidentiary hearing. Instead, the court entered summary judgment in favor of respondent and dismissed the petition. *Turner v. Williams,* 812 F. Supp. 1400 (E.D. Va. 1993). After rejecting the Commonwealth's arguments that Petitioner's claims were barred by *Teague v. Lane,* 489 U.S. 288 (1989), and procedurally defaulted, the U.S. Court of Appeals for the Fourth Circuit affirmed the denial of the writ of habeas corpus, addressing Petitioner's claims on the unconstitutionality of the Virginia sentencing scheme and his claims of ineffective assistance of counsel on the merits. *Turner v. Williams,* 35 F.3d 872 (4th Cir. 1994).

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE IN CONFLICT ABOUT THE FURTHER LIMITATIONS CONSTITUTIONALLY REQUIRED TO PERMIT IMPOSITION OF THE DEATH PENALTY UNDER THE VILENESS AGGRAVATING FACTOR COMMON TO VIRGINIA AND MANY OTHER STATES.

Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980), held that a vileness aggravating factor identical to that at issue here was unconstitutionally vague and overbroad on its face absent clarifying and narrowing jury instructions and appellate review to restrict imposition of the death penalty to crimes lying at the core of the vileness factor. Since *Godfrey,* the lower courts have been divided as to whether jury instructions like those used in Virginia give juries adequate guidance to minimize their ability to impose the death penalty arbitrarily. Furthermore, it is unclear whether appellate review is adequate to save a sentencing scheme where, as here, a State's courts never commute or reverse a capital sentence on Eighth Amendment grounds and make no effort to reconcile death sen-

tences with *lesser* sentences given for similar crimes in other cases. This petition affords this Court the opportunity to resolve conflict and confusion on the requirements necessary to bring the vileness aggravating factor within constitutional bounds.

In general, statutory aggravating factors must meet two constitutional standards to justify a death sentence. They "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey v. Georgia,* 446 U.S. at 428 (footnotes omitted).[9] Additionally, aggravating factors must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* 462 U.S. 862, 877 (1983). Last term, this Court incorporated these standards into a two-prong test. *Tuilaepa v. California,* 114 S. Ct. 2630 (1994). First, "the aggravating circumstance may not be unconstitutionally vague"—that is, it must have a " 'common-sense core of meaning . . . that criminal juries should be capable of understanding.' " 114 S. Ct. at 2635-36 (citing *Godfrey,* 446 U.S. at 428, and *Arave v. Creech,* 113 S. Ct. 1534, 1541 (1993), and quoting *Jurek v. Texas,* 428 U.S. 262, 279 (1976) (White, J., concurring)). Second, "the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." 114 S. Ct. at 2635 (citing *Arave,* 113 S. Ct. at 1542). *Accord Gregg v. Georgia,* 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or

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[9] On several subsequent occasions, a majority of the Court has adopted this standard. *See, e.g., Lewis v. Jeffries,* 497 U.S. 764, 777-78 (1989); *Arave v. Creech,* 113 S. Ct. 1534, 1540 (1993).

spared, that discretion must be suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action."); *Godfrey,* 446 U.S. at 427 ("[A] capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not.") (internal quotes and citations omitted); *Maynard v. Cartwright,* 486 U.S. 356, 362 (1988) ("[O]ur cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

The Virginia statute allows for imposition of the death penalty if the jury finds that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code Ann. § 19.2-264.4(C) (Michie 1994 Supp.). It is identical to provisions in six other States. Del. Code Ann. tit. 11, § 4209(e)(I)(l) (1993); Ga. Code Ann. § 17-10-30(b)(7) (Michie 1994); Mo. Ann. Stat. § 565.032 (2)(7) (Vernon 1994 Supp.); Nev. Rev. Stat. § 200.033 (8) (1992); N.J. Rev. Stat § 2C:11-3(c)(4)(c) (1994 Supp.); S.D. Codified Laws Ann. § 23A-27A-1(6) (1994 Supp.). The first issue presented in this petition is whether the vileness provision as applied below—and generally in Virginia—survives this Court's two-prong test.

A. The Courts Of Appeals Have Adopted Inconsistent Standards By Which Jury Instructions Or Appellate Review Could Cure The Facially Unconstitutional Vagueness Of The Vileness Aggravating Factor.

This Court has addressed this vileness aggravating factor twice, determining that the language is unconstitutionally vague on its face, but leaving open the standards

for jury instructions and appellate review necessary to cure that deficiency. In *Gregg v. Georgia,* 428 U.S. 153, 201 & n.51 (1976), this Court indicated that this factor is subject to challenge for both vagueness and overbreadth and that reviewing courts should consider whether its imprecise language introduces arbitrariness and caprice into the imposition of capital punishment. The Court went on, however, to state that these defects could be cured by appropriate jury instructions and direct appellate review. *Id. Godfrey v. Georgia,* 446 U.S. 420 (1980), specifically held that a provision identical to that under which Petitioner was sentenced was vague on its face. The plurality opinion stated:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. . . . [The trial judge's failure to provide clarifying jury instructions] gave the jury no guidance concerning the meaning of any of [the statute's] terms. In fact, the jury's interpretation of [the provision] can only be the subject of sheer speculation.

446 U.S. at 428-29. The *Godfrey* opinion went on to consider whether there was sufficient independent appellate review of the record to cure the deficiency in that case and held that there was not. *Id.,* 446 U.S. at 429-433.[10]

In addition to the court below, two U.S. courts of appeals have considered what is necessary to cure the defects of such a vileness provision. The Ninth Circuit has held that jury instructions more specific and narrowing than those used here do not provide sufficient guidance. The Eighth Circuit has held that appellate review which does not impose a limiting construction is insuffi-

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[10] Because the Virginia vileness aggravating factor is identical to the Georgia provision at issue in *Gregg* and *Godfrey,* "there is no serious argument" that the factor is constitutional without appropriately narrowing jury instructions and limiting direct appellate review. *Walton v. Arizona,* 497 U.S. 639, 654 (1990).

cient to save the statute. In contrast, the court below upheld the Virginia capital sentencing scheme on the basis of vague and unconstraining jury instructions and a history of nominal appellate review in which no death sentence has been overturned on Eighth Amendment grounds.

The vileness aggravating factor is especially vague in that it includes "depravity of mind" as a basis for imposition of capital punishment.[11] The Ninth Circuit has held that detailed jury instructions did not cure the vagueness of identical language in Nevada's capital sentencing statute. The rejected charge in that case read:

> [T]he condition of the mind described as depravity of mind is characterized by an inherent deficiency of moral sense and rectitude. It consists of evil, corrupt and perverted intent which is devoid of regard for human dignity and which is indifferent to human life. It is a state of mind outrageously, wantonly vile, horrible or inhuman.

Deutscher v. Whitley, 884 F.2d 1152, 1162 n.1 (9th Cir. 1989) ("*Deutscher I*"), *vacated and remanded*, 500 U.S. 901 (1991), *on remand*, 946 F.2d 1443, 1446-47 (9th Cir. 1991) ("*Deutscher II*"), *vacated and remanded*, 113 S. Ct. 367 (1992), *on remand*, 16 F.3d 981 (9th Cir. 1994). The Ninth Circuit held that this instruction did not meet the requirements of *Godfrey* because it failed to "restrain[] arbitrary imposition of the death penalty." The court elaborated: "The depravity instruction in this case, although it contains more words, is no more capable of channeling discretion than the 'especially heinous, atrocious, or cruel' instruction rejected in *Maynard* [*v. Cartwright*, 486 U.S. 356 (1988)] or the 'outrageously or wantonly vile, horrible or inhuman' instruction in *Godfrey*." *Deutscher I*, 884 F.2d at 1162.[12]

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[11] See note 2, *supra*.

[12] After this Court remanded *Deutscher* after vacating on other grounds, the court of appeals again rejected the depravity of mind

When given,[13] the standard Virginia jury instructions define "depravity of mind" as a "degree of moral turpitude and and [sic] psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Turner v. Williams*, 35 F.3d 872, 891 (4th Cir. 1994). Even with further definitions of "malice" and "premeditation," these instructions do not meet this Court's requirement that aggravating factors have a *common-sense* core of meaning that criminal juries should be capable of understanding. *Tuilaepa*, 114 S. Ct. at 2635-36. "Moral turpitude" at best is only an alternative formulation of "baseness," "depravity," or "vileness," words that this Court has rejected as a constitutional basis for imposing the death penalty. *See Godfrey*, 446 U.S. at 428-29.[14] "Psychical debasement" has no apparent meaning at all and could refer to corruption from supernatural, spiritual, mental, moral, emotional, intuitive or any of several other influences. All in all, the jury

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element and the Nevada jury instructions, reiterating the same reasoning from the first opinion in virtually the identical words. *See Deutscher II*, 946 F.2d at 1447. In affirming the prior ruling, the court added that the instruction also "failed to include objective indicia analogous to the instructions approved in *Walton v. Arizona*." *Id.*

[13] In direct contradiction of this Court's holding in *Godfrey*, the Virginia Supreme Court has held that no clarifying jury instructions are required for vileness at all because the predicates are all commonly understood to have the meanings ascribed to them in the jury instructions given here. *See Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984), *rev'd*, 471 U.S. 1096 (1985); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, *cert. denied*, 464 U.S. 977 (1983); *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979).

[14] *See also Shell v. Mississippi*, 498 U.S. 1, 2 (1990) (holding unconstitutional an instruction providing "the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others").

instructions used in Virginia fall considerably short of the instructions found unconstitutional in *Deutscher*.[15]

The alternative holding below—that Virginia's system of appellate review cures the deficiencies in the jury instructions—conflicts with decisions of the Eighth Circuit addressing Missouri's system of appellate review of an identical vileness provision. The Eighth Circuit found that the Missouri Supreme Court failed to cure the defect on direct review, even though it claimed to apply standards narrowing the factor to cases involving physical and psychological torture over a substantial period of time, brutality, mutilation of the body, absence of motive or absence of remorse. *Newlon v. Armontrout*, 885 F.2d 1328, 1334 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990). *See also Mathenia v. Delo*, 975 F.2d 444, 449 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1609 (1993).

Moreover, this Court has clearly stated that appellate review must do more than simply apply a limiting construction to the provision and determine whether the evidence could support a vileness finding; the courts must inquire into "whether *beyond reasonable doubt* the result would have been the same had the [vileness] aggravating circumstance been properly defined in the jury instructions." *Clemons v. Mississippi*, 494 U.S. 738, 754

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[15] Furthermore, a standard which requires "moral turpitude" and "psychical debasement" *surpassing* ordinary malice and premeditation is meaningless because, as defined in the Virginia jury instructions used here, ordinary malice can be inferred from *any* willful, deliberate and cruel act against another. Asking a jury whether a murder defendant's moral turpitude or psychical debasement surpassed this standard—any deliberate act—does not provide the "specific guidance" necessary in a capital sentencing context. Similarly, as defined in the Virginia jury instructions used here, premeditation requires the formation of intent before action, but that intent need not exist for any particular length of time. If the formation of an intent to kill one second before acting meets the standard of premeditation, formation of an intent to kill one hour, or one minute or even two seconds before acting "surpasses" that standard.

(1990) (emphasis added). This requirement imposes a burden which is plainly "more exacting than the burden of finding that the evidence supports the narrowed aggravating factor." *Wiley v. Puckett*, 969 F.2d 86, 93 (5th Cir. 1992). Yet in this case all the Virginia Supreme Court *purported* to do was determine whether the evidence could have supported a finding of vileness. 364 S.E.2d at 489.

Indeed, rather than using appellate review to define the vileness factor more concretely and thus limit the arbitrary nature of the imposition of the death penalty in Virginia, the vagueness of the provision and its instructions has enabled the Virginia Supreme Court to reject every Eighth Amendment challenge it has faced in a capital case. In so doing, the Virginia Supreme Court has held the following:

- That any predicate (including depravity of mind) on its own can suffice for the imposition of a death sentence, *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (1992), *cert. denied*, 113 S. Ct. 1880 (1993);

- That depravity of mind can exist even if the record does not support any finding of torture or aggravated battery, *Stewart v. Commonwealth*, 245 Va. 222, 427 S.E.2d 394, *cert. denied*, 114 S. Ct. 143 (1993);

- That failure to accept responsibility for the crime can support a finding of vileness, *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656, *cert. denied*, 113 S. Ct. 423 (1992);

- That lack of remorse can constitute depravity of mind, *Thomas v. Commonwealth*, 244 Va. 1, 419 S.E.2d 606, *cert. denied*, 113 S. Ct. 421 (1992);

- That depravity of mind can be inferred from premeditation, *Hoke v. Commonwealth*, 237 Va. 303, 377 S.E.2d 595, *cert. denied*, 491 U.S. 910 (1989);

• That vileness can be inferred from the "nature" of the murder as well as the number of batteries, *Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407 (1985), *cert. denied*, 475 U.S. 1031 (1986); and

• That the "vile" conduct can occur after the death of the victim, even if death is instantaneous, *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (1992), *cert. denied*, 113 S. Ct. 1880 (1993); *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 472 U.S. 1012 (1985).

Petitioner's case is an extreme example of the loose standards in the Virginia Supreme Court's appellate review. When that court first considered the facts in *Turner I*, it found that the crime did not reach the level of atrociousness found in many other capital cases, 273 S.E.2d at 47, but upheld the death sentence because "[e]ven if Turner's crime did not meet the 'vileness" standard, imposition of the death penalty would be permissible under the 'dangerousness' standard." 273 S.E.2d at 45. After the *Turner II* jury rejected future dangerousness as an aggravating factor, the Virginia Supreme Court, revisiting the same facts it addressed in *Turner I*, held that "[w]e think that the evidence of Turner's conduct in killing his victim" meets the depravity of mind standard "clearly and completely." 364 S.E.2d at 489. The vagueness of the depravity of mind predicate, its malleability to adjust to any set of circumstances, and the Virginia Supreme Court's inability to set limits on its adaptability together can yield any result—even different results on the same facts before the same court.

Because several states have aggravating factors containing a depravity of mind predicate, because the Fourth Circuit is in conflict with both this Court and with other circuits regarding the standards that jury instructions and appellate review must meet to comply with constitutional requirements, and because the Fourth Circuit has indi-

cated that it has no intention of reconsidering the issue,[16] this Court should provide guidance as to the clarifying jury instructions and depth of appellate review necessary for constitutional application of the vileness aggravating factor.

B. The Court Of Appeals Has Ignored This Court's Precedents Requiring Every Aggravating Factor To Narrow The Class Of Death-Eligible Crimes.

Even if an aggravating factor is clear, specific and objective, it must still narrow the class of death-eligible defendants. "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Arave*, 113 S. Ct. at 1542, *quoted with approval in Tuilaepa*, 114 S. Ct. at 2635. To meet the demands of the Eighth Amendment, an aggravating factor "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The Virginia jury instructions for vileness through the depravity of mind predicate, however, authorize a death sentence for virtually *every* murder defendant.

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[16] The Fourth Circuit has repeatedly upheld the Virginia sentencing scheme. The opinion below simply declares with no analysis that "we have on several occasions upheld [these] limiting definitions . . . [and] we believe [they] are sufficiently clear and objective." *See Turner v. Williams*, 35 F.3d 872, 892 (4th Cir. 1994). No common-sense meaning of the instructions is offered. In *Jones v. Murray*, 976 F.2d 169, 174-75 (4th Cir.), *cert. denied*, 113 S. Ct. 27 (1992), the prior opinion cited as precedent on this issue, the court merely stated in a conclusory fashion that the instructions provided adequate guidance to the jury. Its predecessor, *Jones v. Murray*, 947 F.2d 1106, 1118-19 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1591 (1992), rejected the argument that these limiting instructions are utterly unintelligible to the average juror, but the opinion offered no elucidation of the common-sense meaning of the instructions.

This Court's first opinion on the vileness factor at issue here noted that: "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed this way, and there is no reason to assume that the [State] Supreme Court . . . will adopt such an open-ended construction." *Gregg v. Georgia*, 428 U.S. 153, 201 (1976). In *Godfrey v. Georgia*, this Court had to revisit this vileness aggravating factor because the Georgia courts continued to affirm death sentences based on nothing more than findings that the offenses were "outrageously or wantonly vile, horrible or inhuman." 446 U.S. 420, 428 (1980). The Court reiterated the concern that a "person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and [sic] inhuman.'" 446 U.S. at 428-29. In holding that the Georgia vileness provision as applied was unconstitutional, this Court made clear that the vileness factor cannot simply be a catch-all and that state standards must restrict imposition of capital punishment for vileness to those cases that lie at the core of its meaning. *See Godfrey*, 446 U.S. at 429-30.

The standard Virginia jury instructions given at Petitioner's resentencing require nothing more than "moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation," which in turn are defined, respectively, as "every unlawful or unjustified motive" and the presence of "a specific intent to kill" which "need not exist for any particular length of time." *Every* murder defendant eligible for the death penalty in Virginia, however, has committed a crime that is, by definition, willful, deliberate and premeditated. Va. Code Ann. §§ 18.2-31, 19.2-264.4 (Michie 1994 Supp.). *Every* death-eligible murder is a crime surpassing other willful, deliberate and cruel acts against another. If possession of intent to kill for even a moment suffices to meet the standard of premeditation, *every* capital murder surpasses that standard; capital mur-

der, by definition, excludes manslaughter and crimes of passion. *Every* capital murder involves serious moral turpitude and debasement in its lack of respect for human life and thus is inherently depraved. Accordingly, Virginia's instructions are not "limiting" or "narrowing" at all; instead, they permit a jury to recommend a capital sentence for any death-eligible defendant. In light of *Tuilaepa* and the standards elucidated in *Arave* and *Zant*, they are unconstitutional.[17]

Nor is there anything in Virginia's standards of appellate review that restricts approval of death sentences to "those cases that lie at the core" of the vileness provision. *Godfrey*, 446 U.S. at 429. The Virginia Supreme Court has repeatedly held that use of more than one bullet in a shooting alone is enough to support a finding of vileness. *See, e.g., Watkins v. Commonwealth*, 229 Va. 469, 489, 331 S.E.2d 422, 437 (1985), *cert. denied*, 475 U.S. 1099 (1986) (citing *Turner I*, 221 Va. at 518, 527, 273 S.E.2d at 39, 45). Furthermore, multiple shots are enough to impose a death sentence under the aggravated battery predicate of the vileness factor even if no single wound would have killed the victim and the combined shots were the minimum necessary to accomplish the act of murder. *Barnes v. Commonwealth*, 234 Va. 130, 139, 360 S.E.2d 196, 202-03 (1987), *cert. denied*, 484 U.S. 1036 (1988). In fact, *even a single gunshot wound* alone is enough for Virginia to uphold a finding of vileness for depravity of mind where the crime is premeditated and the defendant displays a lack of remorse. *See Bunch v. Commonwealth*, 225 Va. 423, 443-44, 304 S.E.2d 271, 282-83, *cert. denied*, 464 U.S. 977 (1983). The Virginia Supreme Court has also repeatedly held that a single stab wound is enough to support a finding of vileness under the aggravated battery predicate of the vileness factor.

[17] In a recent opinion, the Florida Supreme Court rejected an aggravating factor for crimes which are "cold, calculated and premeditated" as unconstitutionally vague and overbroad. *Jackson v. State*, No. 79509, 1994 WL 137914 (Fla. Apr. 21, 1994).

See Mu'Min v. Commonwealth, 239 Va. 433, 450, 389 S.E.2d 886, 897 (1990), *aff'd*, 500 U.S. 415 (1991); *Stout v. Commonwealth*, 237 Va. 126, 132, 376 S.E.2d 288, 291, *cert. denied*, 492 U.S. 925 (1989); *Edmonds v. Commonwealth*, 229 Va. 303, 312, 329 S.E.2d 807, 814, *cert. denied*, 474 U.S. 975 (1985). Thus, Virginia's review of the aggravating factor is so lenient as to accommodate *every* death-eligible crime.

Although the Fourth Circuit has characterized Virginia's depravity of mind jury instructions as "limiting," no panel has ever provided a reasoned opinion explaining *how* the jury instructions narrow the class of death-eligible defendants. *See Turner v. Williams*, 35 F.3d 872, 892 (4th Cir. 1994) (following *Jones v. Murray*, 976 F.2d 169, 174-75 (4th Cir.), *cert. denied*, 113 S. Ct. 27 (1992)); *Jones*, 976 F.2d at 174-75 (stating without elaboration that the "instructions clearly direct the jury away from that result by requiring that something extra be present," *i.e.*, moral turpitude and psychical debasement surpassing malice and premeditation); *Jones v. Murray*, 947 F.2d 1106, 1119 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1591 (1992) (citing *Turner v. Bass*, 753 F.2d 342, 351 (4th Cir. 1985)); *Turner*, 753 F.2d at 351 ("[T]he Virginia Court has also given a limiting construction to two components of the vileness criterion. Depravity of mind has been construed to mean 'a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.' " (citation omitted)).

Because the court below has repeatedly endorsed decisions of the Virginia Supreme Court which conflict with applicable decisions of this Court, the Court should grant certiorari on the issue of failure to narrow as well as vagueness.

II. THE COURT OF APPEALS' REJECTION OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DEPARTS FROM THE PRECEDENTS IN THIS COURT AND OTHER COURTS OF APPEALS.

The Sixth Amendment's guarantee of the right to assistance of counsel mandates that such assistance be effective. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).[18] In *Strickland*, this Court elucidated a three-part test to determine if counsel's performance fails to meet this standard: (1) counsel's representation must fall below an objective standard of reasonableness, 466 U.S. at 687; *and* (2) the deficient performance must prejudice the defense, 466 U.S. at 687; *but* (3) counsel's strategic choices are entitled to deference if "made after thorough investigation of law and facts relevant to plausible options," 466 U.S. at 690. Some conduct by counsel is so unreasonable, so prejudicial and so unlikely to constitute trial strategy that it constitutes ineffective assistance of counsel as a matter of law.

Several lower court decisions have ruled that failure to put on evidence promised in an opening statement by itself constitutes ineffective assistance of counsel. *Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir. 1988), held that the failure to put on expert witnesses promised in defense counsel's opening statement was "prejudicial as a matter of law." When faced with a fact pattern nearly identical to the one presented in this petition, the Seventh Circuit held as follows:

> [C]ounsel decided not to present these available witnesses; he chose to gamble on his perceptions about the weakness of the prosecution's case. By resting without presenting any of the evidence in favor of the defense, counsel left the jury free to believe [the prosecution's] account of the incidents as the only

[18] The guarantee of effective assistance of counsel extends to capital sentencing proceedings. *Strickland*, 466 U.S. at 684-87.

made during the pretrial period and his notes during the resentencing hearing itself indicate that he knew his preparation was woefully inadequate. He failed to subpoena or even interview a single mitigation witness.[23] Counsel must have known that his failure to prepare would all but preclude presentation of the evidence he was promising to the jury in his opening statement. Yet he promised testimony, knowing the results in *Turner I*, knowing that the jury was aware of the prior verdict, knowing the prosecution's case, knowing that he was not prepared to make good on his promises, knowing his

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evidence." *Turner v. Williams*, 35 F.3d 872, 895 (4th Cir. 1994). Indeed, to the extent the court of appeals attributed counsel's failure to put on evidence to "strategic choices" (35 F.3d at 903, 904), it is important to bear in mind that *Strickland* allows for deference to counsel's decisions only if they are based on a "thorough investigation of law and facts relevant to plausible options." 466 U.S. at 690. The failure to make thorough investigation is permissible only to the extent that "reasonable professional judgments support the limitations on investigation." 466 U.S. at 691.

That counsel's failures were a result of poor preparation and were not attributable to fear of rebuttal is evident from his failure to introduce the evidence of Petitioner's role in saving hostages from murder and rape even when there was a risk-free opportunity to do so during cross-examination. When Commonwealth witness J.E. Mills, who read the statements favored by the prosecution, finished testifying, the prosecutor asked him whether he had reviewed every statement relating to the incident. After he answered in the affirmative, giving defense counsel a perfect opportunity to cross-examine on Petitioner's role, counsel did nothing.

[23] With regard to Dr. Fisher, the expert witness appointed to testify on Petitioner's behalf, the court below declared: "In the instant case, Snook intended at outset to present the evidence described in opening statement" (*Turner v. Williams*, 35 F.3d 872, 904 (4th Cir. 1994)) and that "[o]ne direct meeting [between Dr. Fisher and] Mr. Turner was all that [was] necessary" (35 F.3d at 898). *Yet Dr. Fisher had not met Petitioner when counsel made his promises during the opening statement.* Even by this absurdly low standard, counsel was not prepared to present the evidence when he promised it to the jury.

client's life was at stake. And then he rested without putting on any case whatsoever.

When considering Virginia's system of representation in capital cases, Chief Justice Rehnquist observed that:

> Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack.

Murray v. Giarratano, 492 U.S. 1, 11 (1989). Unfortunately, that admonition came too late for Petitioner. He did not receive effective assistance of counsel during his resentencing hearing, and the Constitution requires that his death sentence be vacated and that the case be returned for a fair resentencing.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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